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Supreme Court of the United States

OCTOBER TERM 1948

No. 567

HARVEY STEMMER,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK.

APPLICATION FOR WRIT OF CERTIORARI

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No.

HARVEY STEMMER,

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THE PEOPLE OF THE STATE OF NEW YORK.

APPLICATION FOR WRIT OF CERTIORARI

This is an application for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, which affirmed a judgment of the Appellate Division of the Supreme Court of that State, which in turn affirmed a judgment of the Court of General Sessions of the County of New York convicting petitioner of conspiracy under New York Penal Law §580(6) and of bribery under New York Penal Law §382.

The Opinions Below

No opinion was written either in the Appellate Division (273 App. Div. 854) or in the Court of Appeals (298 N. Y. 728), but the latter Court made the following statement:

> "Judgment affirmed. Upon this appeal the following question was presented and necessarily passed upon: The appellants contended that the receipt in

evidence of wire tapped telephone calls was illegal because of section 605 of the Federal Communications Act of 1934 (U. S. Code, tit. 47, §605). This court held to the contrary. (See *Matter of Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15.) No opinion."

Summary Statement

Petitioner, with others, was indicted and convicted for offering bribes to two professional football players and for conspiracy to offer those bribes. The testimony against petitioner consisted entirely of that of an accomplice, Paris, together with telephone conversations overheard as the result of wire tapping.

At the trial the football players (Hapes and Filchock) to whom bribes had been offered testified, but neither of them implicated petitioner (191, 295*). The accomplice, Paris, testified that petitioner had induced him to make these offers (468, 525, 537, 539, 555). Under the law of New York a conviction may not rest on the uncorroborated testimony of an accomplice. (New York Criminal Code §399; *People* v. *Nitzberg*, 289 N. Y. 523.) It was therefore incumbent upon the prosecution to produce some corroborative testimony to connect petitioner with the crime.

The only evidence purporting to corroborate the accomplice was that of a police officer, Joseph L. Jove. He testified to having obtained orders permitting the tapping of the telephone wires at Paris' home (1615, 1616). This was done pursuant to the provisions of Article 1, Section

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* The references are to the folios of the record used in the state courts.

12 of the Constitution of the State of New York, and Section 813(a) of the New York Criminal Code, enacted in 1938. These permit the tapping of telephone wires upon an affidavit showing that there is reasonable ground to believe that evidence of crime may be so obtained.

Jove testified with regard to a number of outgoing calls from Paris' apartment. He identified petitioner as the person speaking in Paris' apartment in connection with two of these calls. One, No. 5Q, was an intrastate call made to a number in the Bronx (1803). The other, No. 5R, was an interstate call to Elizabeth, New Jersey (1820). Jove also testified that petitioner was the party calling in on a number of other calls, the source or origin of which was not identified (1726-1795). He was permitted to state the substance of the conversations he overheard; his notes were introduced into evidence. The petitioner's attorney objected to the receipt of this evidence on the ground that section 605 of the Federal Communications Act forbade its disclosure (1643-45).

There can be no doubt that this testimony determined the jury's verdict. Indeed, the trial court charged that petitioner must be acquitted unless the jury was satisfied that the voice overheard by the police officer was in fact petitioner's voice (2681, 2688, 2705).

Statement on Jurisdiction

The judgment of the Court of Appeals was entered on November 24, 1948. That judgment was final under the law of New York. The jurisdiction of this Court is invoked under Section 1257 of the Revised Judicial Code.

Statutes Involved

The following statutes are set forth in full in the appendix to this petition:

Section 605 of the Federal Communications Act (47 U. S. C. 605);
Constitution of the State of New York, Article 1, Section 12;
New York Criminal Code, Sections 399 and 813(a).

The Question Presented

There is but a single question: Does the prohibition against disclosure of telephone conversations contained in the Federal Communications Act, prevent a state criminal court from listening to a report of such conversation when overheard as a result of wire tapping not consented to by a party to the conversation?

Reasons for Granting the Writ

The writ should be granted because the issue is one of great public importance which has not heretofore been determined by this Court, and because the decision of the state court contravenes principles established by this Court, particularly in *Nardone* v. *United States*, 302 U. S. 379, and *Weiss* v. *United States*, 308 U. S. 321.

THE ARGUMENT

The language of Section 605 of the Federal Communications Act is plain. It says:

> "No person not being authorized by the sender shall interrupt any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such interrupted communication to any person * * *"

There can be no question, of course, in the case at bar, that the disclosure was not authorized by the sender of the message, either by petitioner or by the accomplice.

This Court has construed the statute to apply to all persons, agents of the government as well as private individuals. That question came up in *Nardone* v. *United States,* 302 U. S. 379. There the government strongly urged that Congress had not intended to ban the interception of telephone messages by law enforcement agents. This Court held otherwise. Mr. Justice Roberts said:

> "We nevertheless face the fact that the plain words of §605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *'no person'* shall divulge or publish the message or its substance to *'any person.'* To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments" (p. 382).

While that case was originally tried in a federal court and involved the application of the statute to federal agents, there is nothing whatever in the reasoning of this Court which would confine the result to that precise situation. If, as this Court has held, the word "person" includes an agent of the United States Government, it must include an agent of a state or municipality as well. The decision rested on the breadth of the word used by Congress and the policy of the law, not on the circumstances that the particular agents in the case were federal ones or the trial held in a federal court. The rule there laid down has never been deviated from. Moreover, in the *Weiss* case, 308 U. S. 321, this Court applied the ban to wholly intrastate conversations. Thus all of the conversations divulged in the case at bar come within the ban. Taken together, these two cases make it plain beyond argument that the federal law validly prohibits the interception and divulgence of *all* telephone messages by *anyone.*

In the Court of Appeals the memorandum of affirmance cited an earlier decision of that Court dealing with the subject (*Matter of Harlem Check Cashing Corp.* v. *Bell,* 296 N. Y. 15) in which some attempt was made to reason out the Court's refusal to apply the Communications Act. In that case, it is significant, however, that the Court of Appeals did not discuss the *Nardone* case at all and tried to distinguish the *Weiss* case on the single ground that there the messages had been intercepted without resort to the procedure authorized by the New York Constitution and Code. Quite erroneously the *Weiss* decision was characterized as one dealing only with the admissibility of evidence in a Federal Court, whereas in fact the decision concerned itself with the interpretation of a federal statute in a field in which federal power was validly exercised.

It is, we submit, wholly irrelevant that the State of New York may have set up a procedure for wire tapping which, under limited conditions, made such wire tapping legal under the laws of that state. Such procedure can have no effect on the validity of the acts concerned under federal law. Since the tapping of *any* wires violates the federal law, no permission granted by a New York court can make legal what federal law has declared illegal. Supremacy of the federal law under such circumstances cannot be disputed. See *Testa* v. *Katt*, 330 U. S. 386; *Francis* v. *Southern Pacific Co.*, 333 U. S. 445.

In the *Harlem Check Cashing Corp.* case, *supra*, the New York Court of Appeals suggested that the federal statute must be limited to federal jurisdiction unless there was a clear indication to the contrary in the statute itself. The Court there cited three cases in support of that doctrine: *Townsend* v. *Yeomans*, 301 U. S. 441; *Atchison Railway* v. *Railroad Commission*, 283 U. S. 380; *Savage* v. *Jones*, 225 U. S. 501.

These cases have no application whatever to a situation such as the one now before the Court. They all dealt with the commerce power. In that field it has long been established that a federal regulation will not necessarily bar a state regulation unless it is clear that Congress intended to occupy the whole field. However, the *Weiss* case demonstrates that Congress did intend to occupy the whole field in the Federal Communications Act. It makes little sense to suppose that Congress intended to occupy the whole field, dealing both with interstate and intrastate messages, and intended to prevent all interception, including interception by federal agents, yet that Congress intended to permit interception by state agents or disclosure in state courts. That would be reading something into the law for

which there is no warrant either in its policy or in its legislative history.

Here we are dealing with a federal prohibition against action by any person. As was pointed out in the *Nardone* case, Congress enacted this law as an expression of its general policy disapproving of wire tapping. It might have made an exception permitting wire tapping in aid of state law enforcement. It did not. The state courts cannot carve out an exception in favor of themselves.

It should be noted, indeed, that the Court of Appeals did not rest its decision on the New York rule that illegally obtained evidence is admissible (*People* v. *Defore*, 242 N. Y. 13). Moreover, there is here no question of illegally obtained evidence. For the very divulgence of the conversations was the commission of a crime in the presence of the Court (Cf. 302 U. S. at 382). That the Federal Communications Act prohibits such disclosure even in the state court has been the uniform view of commentators (See Bernstein, The Fruit of the Poisonous Tree; Civil Liberties and Wire Taps, 37 Illinois Law Review, 99, 108; Rosenzweig, The Law of Wire Tapping, 32 Cornell Law Quarterly, 514, 546; note: 7 Fordham Law Review, 263).

Finally, in other situations various courts have held that when a federal statute forbids the use of certain kind of material it cannot be received by a state court although the statute made no special reference to such court (See *People* v. *Donnenfeld*, 198 App. Div. 918, affd. 233 N. Y. 526, as to statements made in bankruptcy under 11 USCA §25; *Chartiers & Robinson Turnpike Company* v. *McNamara*, 72 Pa. 278 (unstamped documents under Act of July 13, 1866, §9).

The problem presented by this case is serious. It is moreover far-reaching, since other state courts have

reached the same result as did the New York Court (See *Hitzelberger* v. *State*, 174 Md. 152; *Leon* v. *State*, 180 Md. 279, cert. den. 316 U. S. 680; *People* v. *Kelley*, 22 Calif. (2d) 169; *People* v. *Barnhardt*, 66 Cal. App. (2d) 714). This court should, therefore, grant certiorari, so as to clarify the law and declare a uniform policy which shall be observed by all the courts in the country.

Dated: January 31st, 1949.

Respectfully submitted,

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APPENDIX

Section 605 of the Federal Communications Act
(47 U. S. C. 605)

§605. UNAUTHORIZED PUBLICATION OR USE OF COMMUNICATIONS

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or

meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)

Constitution of the State of New York, Article 1, Section 12

§12. [SECURITY AGAINST UNREASONABLE SEARCHES, SEIZURES AND INTERCEPTIONS.]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.

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New York Criminal Code, Sections 399 and 813(a).

§399. Conviction Cannot Be Had on Testimony of Accomplice, Unless Corroborated

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime. As amended L. 1882, c. 360, §1. Eff. June 21, 1882.

§813-a. Ex Parte Order for Interception

An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together

with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same. Added L. 1942, c. 924, eff. May 23, 1942.

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